Dura-Mine Sdn Bhd v Elster Metering Ltd & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–6 OF 2012
ARIFIN ZAKARIA CHIEF JUSTICE, ABDULL HAMID EMBONG, ZALEHA ZAHARI, JEFFREY TAN AND ABU SAMAH FCJJ
18 NOVEMBER 2014

Copyright — Drawings and plans — Infringement of copyright — Claimant to copyright failed to annex original drawings of work to statutory declaration filed pursuant to s 42 of the Copyright Act 1987 — Argument that prima facie evidence of entitlement to copyright therefore could not arise — Argument that without original drawings court could not decide if copyright had been infringed — Whether arguments untenable in view of fact claimant had shown unbroken chain of entitlement to copyright over all original drawings and modifications thereto going back to first author of drawings — Whether infringer failed to rebut claimant's ownership of copyright — Whether claimant to copyright could adduce oral or other evidence to prove entitlement even if s 42 statutory declaration or affidavit was defective — Whether s 42 not the only means in providing copyright claim

The respondents sued the appellant in the High Court for infringing their copyright in six engineering drawings of a rotational water meter ('the Kent meter') by causing to be manufactured, imported and/or offered for sale a water meter that was substantially modelled on the Kent meter. The first respondent claimed ownership by acquisition of the copyright whilst, pursuant to a manufacturing and distribution agreement between the respondents, the second respondent claimed exclusive licence to the copyright in Malaysia and three other countries. The appellant, on the other hand, pleaded that its water meter was of original design manufactured by a company in China. The High Court found the appellant had infringed the respondents' copyright as its water meter was not of original design but had substantially copied from the Kent meter and that the appellant had failed to rebut prima facie evidence that the respondents had ownership of copyright. The Court of Appeal ('the COA') affirmed the trial court's findings despite the appellant contending that the respondents' failure to annex the original drawings of the Kent meter to their statutory declaration ('the SD') filed pursuant to s 42 of the Copyright Act 1987 ('the Act') had resulted in their failure to raise prima facie evidence of the copyright. The appellant argued that only modified versions of the original drawings were annexed to the SD and that without the original drawings before it, the court could not decide whether there was in fact copyright infringement. The respondents countered that all modifications to the original drawings were numbered and tabulated on the drawings such that the original design could be made out without the need to produce the entire set of original drawings and

modifications thereto. The COA held, inter alia, that the respondents had shown an unbroken chain of ownership of the copyright which the appellant had failed to challenge. In the instant appeal, the appellant revisited the contention that the first respondent had not complied with s 42(1)(a)(ii) and (iii) of the Act in failing to annex the original drawings to the SD.

Held, dismissing the appeal with costs:

(1) Section 42(1)(a)(iii) of the Act required the person claiming ownership of copyright in any work eligible for copyright under the Act to annex a true copy of the work. There was no requirement for the original copy of the work to be annexed. In the context of the instant case, there was no requirement that the original drawing, original in the sense of not copied or in the sense of the first or the earliest, had to be annexed to the respondents' SD. The requirement was for a true copy of the work in the sense of a true and accurate depiction of the work in which copyright subsisted (see paras 8 & 11).

(2) Sections 7, 10 and 26(1) of the Act, read together, provided that ownership of copyright of a work eligible for copyright subsisted initially with the author of the work. In the instant case, the SD affirmed that the drawings annexed to it were true copies of original drawings made by employees of the first respondent or its predecessors in the course of their employment. The respondents gave a complete account, all authenticated by documents, of the chain of ownership of the copyright from the beginning to the lap of the first respondent. The respondents also showed that all modifications of the original design were brought about by the labour and effort (the dates of execution of the works were disclosed) of the employees (all named) of the first respondent or its predecessors from whom the first respondent acquired the copyright. The original design and its modifications, as per the drawings, all originated from the first respondent or its predecessors in title. It was convincingly made out that the first respondent owned the copyright of the original design and the entire chain of modifications and that the second respondent was the licensee of that copyright (see paras 13, 25 & 27).

(3) As the first respondent owned 'the entire chain of works', the original drawings and all modifications had to be taken as a whole and as being original. As a result, the appellant's argument that the earliest works had not been disclosed and that the later ones were unoriginal as being copies of the earlier drawings with insignificant alterations, failed (see para 26).

(4) Section 26(4)(a) of the Act provided that the name on a work purporting to be the name of its author shall be considered as such unless the contrary was proved. On each of the drawings, the predecessor in title of the first respondent, namely Kent Meters Ltd, appeared as the author. It was not shown to the court that Kent Meters Ltd was not the author or

that the s 42 prima facie evidence had been rebutted or that the finding of the courts below that the copyright had been infringed was insupportable (see para 27).

(5) Although under s 42(1) of the Act, an affidavit or SD made by or on behalf of a person claiming copyright to any works eligible for copyright must strictly comply with the whole of s 42(1)(a)(i)–(iii) in order to be admissible as prima facie evidence of the facts stated therein, s 42 was far from being the be-all and end-all of proof. For, other than by affidavit or SD, a person claiming copyright could adduce oral evidence and tender other evidence, the admission of which was not precluded by the Act. Section 42 provided a means, but not the only means, of proving copyright. As oral evidence was open to cross-examination and therefore was of higher evidential value than affidavit or SD evidence, the court agreed with the pragmatic approach adopted by some courts to allow oral evidence to augment, correct, or even supplant, a defective s 42 affidavit or SD (see para 28).

[Bahasa Malaysia summary

Responden-responden telah menyaman perayu di Mahkamah Tinggi kerana melanggar hak cipta mereka dalam enam lukisan kejuruteraan tentang meter air putaran ('meter Kent') dengan menyebabkan pembuatan, pengimportan dan/atau tawaran untuk jualan meter air yang dimodelkan dengan ketara pada meter Kent. Responden pertama menuntut hakmilik melalui perolehan hak cipta manakala, menurut perjanjian pembuatan dan pengedaran antara responden-responden, responden kedua menuntut lesen eksklusif terhadap hak cipta di Malaysia dan tiga negara lain. Perayu, sebaliknya, mengaku bahawa meter airnya adalah reka bentuk asal yang dibuat oleh sebuah syarikat di China. Mahkamah Tinggi mendapati perayu telah melanggar hak cipta responden-responden kerana meter airnya bukan reka bentuk asal tetapi telah meniru sebahagian besar daripada meter Kent dan bahawa perayu telah gagal untuk mematahkan keterangan prima facie bahawa responden-responden mempunyai pemilikan hak cipta. Mahkamah Rayuan ('MR') mengesahkan penemuan mahkamah perbicaraan meskipun perayu yang menghujahkan bahawa kegagalan responden-responden untuk melampirkan lukisan-lukisan asal meter Kent kepada deklarasi statutori mereka ('DS') yang difailkan menurut s 42 Akta Hakcipta 1987 ('Akta tersebut') telah mengakibatkan dalam kegagalan mereka untuk menimbulkan keterangan prima facie tentang hak cipta. Perayu berhujah bahawa hanya versi yang diubah untuk lukisan-lukisan asal itu telah dilampirkan kepada DS itu dan bahawa tanpa lukisan-lukisan asal di hadapannya, mahkamah tidak boleh memutuskan sama ada terdapat pelanggaran hak cipta. Responden-responden telah menjawab bahawa semua pengubasuaian kepada lukisan-lukisan asal itu telah dinomborkan dan dibentangkan atas lukisan-lukisan itu sehinggakan reka bentuk asal dapat dibuat tanpa perlu mengemukakan keseluruhan set

lukisan-lukisan asal dan pengubahsuaian kepada lukisan-lukisan tersebut. MR memutuskan, antara lain, bahawa responden-responden telah menunjukkan rantaian milikan hak cipta yang tidak terputus yang telah gagal untuk dicabar oleh perayu. Dalam rayuan ini, perayu telah melihat semula hujah bahawa responden tidak mematuhi s 2(1)(a)(ii) dan (iii) Akta tersebut kerana gagal melampirkan lukisan-lukisan asal itu kepada DS.

Diputuskan, menolak rayuan dengan kos:

(1) Seksyen 42(1)(a)(iii) Akta tersebut menghendaki orang yang menuntut milikan hak cipta dalam apa-apa karya yang layak mendapat hak cipta di bawah Akta tersebut untuk melampirkan salinan asal karya itu. Tiada keperluan untuk salinan sebenar karya itu dilampirkan. Dalam konteks kes ini, tiada keperluan untuk lukisan asal, asal dalam erti kata tidak ditiru atau dalam erti kata yang pertama atau yang terawal, dilampirkan kepada DS responden-responden. Keperluannya adalah untuk salinan sebenar karya itu dalam maksud gambaran sebenar dan tepat karya itu di mana wujud hak cipta (lihat perenggan 8 & 11).

(2) Seksyen 7, 10 dan 26(1) Akta tersebut, dibaca bersama, memperuntukkan bahawa milikan hak cipta karya yang layak mendapat hak cipta wujud pada mulanya dengan pencipta karya itu. Dalam kes ini, DS itu telah mengesahkan lukisan-lukisan yang dilampirkan kepadanya adalah salinan sebenar lukisan-lukisan asal yang dibuat oleh pekerja-pekerja responden pertama atau orang sebelumnya semasa tempoh pekerjaan mereka. Responden-responden telah memberikan gambaran lengkap, kesemuanya disahkan oleh dokumen-dokumen, tentang rantaian milikan hak cipta dari mula hingga kepada responden pertama. Responden-responden juga menunjukkan bahawa semua pengubahsuaian reka bentuk asal itu disebabkan oleh tenaga dan usaha (tarikh-tarikh pelaksanaan karya-karya ditunjukkan) pekerja-pekerja (semua dinamakan) responden pertama atau orang sebelumnya daripada mana responden pertama telah memperoleh hak cipta. Reka bentuk asal dan pengubahsuaiannya, seperti mana lukisan-lukisan itu, semuanya berasal daripada responden pertama atau orang sebelumnya yang mempunyai hakmilik. Ia membuktikan dengan yakin bahawa responden pertama memiliki hak cipta reka bentuk asal itu dan keseluruhan rantaian pengubahsuaian dan bahawa responden kedua adalah pemegang lesen hak cipta tersebut (lihat perenggan 13, 25 & 27).

(3) Oleh kerana responden pertama memiliki 'the entire chain of works', lukisan-lukisan asal itu dan semua pengubahsuaian telah diambil sebagai keseluruhan dan sebagai yang asal. Akibatnya, hujahan perayu bahawa karya-karya terawal tidak ditunjukkan dan bahawa yang kemudian bukan yang asal sebagai salinan lukisan-lukisan terdahulu dengan pengubahsuaian kecil, telah gagal (lihat perenggan 26).

(4) Seksyen 26(4)(a) Akta tersebut memperuntukkan bahawa nama pada karya yang dikatakan atas nama penciptanya hendaklah dianggap sedemikian kecuali yang bertentangan dibuktikan. Pada setiap lukisan, orang sebelum yang mempunyai hakmilik responden pertama, iaitu Kent Meters Ltd, kelihatan sebagai pencipta. Ia tidak dibuktikan kepada mahkamah bahawa Kent Meters Ltd bukan pencipta atau bahawa s 42 keterangan prima facie telah dipatahkan atau bahawa penemuan mahkamah bawahan yang hak cipta telah dilanggari tidak boleh disokong (lihat perenggan 27).

(5) Walaupun di bawah s 42(1) Akta tersebut, afidavit atau DS yang dibuat oleh atau bagi pihak seseorang yang menuntut hak cipta apa-apa hak cipta hendaklah mematuhi sepenuhnya keseluruhan s 42(1)(a)(i)–(iii) bagi tujuan boleh diterima sebagai keterangan prima facie fakta yang dinyatakan, s 42 tidak boleh dianggap sebagai bukti menyeluruh. Seksyen 42 memperuntukkan satu cara, tetapi bukan satu-satunya cara, untuk membuktikan hak cipta. Oleh kerana keterangan lisan adalah terbuka untuk pemeriksaan balas dan oleh itu mempunyai nilai keterangan lebih tinggi daripada afidavit atau keterangan DS, mahkamah bersetuju dengan pendekatan pragmatik yang diterima pakai oleh beberapa mahkamah untuk membenarkan keterangan lisan bagi menambah, membetul, atau bahkan menggantikan, afidavit s 42 atau DS yang defektif (lihat perenggan 28).]

Notes

For a case on infringement of copyright, see 3(3), *Mallal's Digest* (4th Ed, 2013 Reissue) para 6999.

Cases referred to

ABB Ltd & Ors v New Zealand Insulators Ltd [2006] 3 NZLR 645, HC (refd)
Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd (1995) IP & T Digest 18, Ch D (refd)
Elster Metering Ltd & Anor v Damini Corp Sdn Bhd & Anor [2011] 8 MLJ 253, HC (refd)
Elster Metering Ltd & Anor v Premier Amalgamated Sdn Bhd [2010] 2 CLJ 149, HC (refd)
Fossil Inc v Trimset Ltd & Anor [2003] HKCU 521, HC (refd)
HKSAR v Chan Tak Tim [2004] 4 HKC 98, CA (refd)
HKSAR v Elegant Technology Ltd [2004] 3 HKC 37, CA (refd)
Husqvarna Forest & Garden Ltd v Bridon New Zealand Ltd [1997] 3 NZLR 215, HC (refd)
Kiwi Brands (M) Sdn Bhd v Multiview Enterprises Sdn Bhd [1998] 6 MLJ 38, HC (refd)
LA Gear Inc v Hi-Tech Sports plc (1991) Times, 20 December, CA (refd)

Lam Soon (M) Bhd v Forward Supreme Sdn Bhd & Ors [2001] 6 MLJ 651, HC (refd)
Lau Foo Sun v Government of Malaysia [1974] 1 MLJ 28, FC (refd)
Peko Wallsend Operations Ltd & Ors v Linatex Process Rubber Bhd and another action [1993] 1 MLJ 225, HC (refd)
PP v Sim, Odita, Muhammad Sdn Bhd [2008] 7 MLJ 164; [2008] 3 CLJ 623, HC (refd)
Rock Records & Tapes Co Ltd & 5 Ors v Season Karaoke Sdn Bhd & 4 Ors [1999] 1 AMR 78, HC (refd)
Rock Records (M) Sdn Bhd v Audio One Entertainment Sdn Bhd [2005] 3 MLJ 552, HC (refd)
Solid Gold Publishers Sdn Bhd v Chan Wee Ho & Ors [1998] MLJU 276; [1998] 5 CLJ 735, HC (refd)
TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd [1985] 2 MLJ 45, FC (refd)
Tse Mui Chun v HKSAR [2003] HKCU 1408 (refd)
Ultra Dimension Sdn Bhd v American Home Assurance Co (Rewardstreet.com (M) Sdn Bhd, third party) [2009] 8 MLJ 643; [2009] 9 CLJ 589, HC (refd)
Ultra Dimension Sdn Bhd v Ketua Pengarah Lembaga Penggalakan Pelancongan Malaysia & Ors [2010] 8 CLJ 245, HC (refd)
University of London Press Ltd v University Tutorial Press Ltd [1916] 2 Ch 601, Ch D (refd)

Legislation referred to

Copyright Act 1987 ss 7, 7(3)(a), 10, 26(1), (3), (4), 26(4)(a), 42, 42(1), 42(1)(a), 42(1)(a)(i), (ii), (iii)
Copyright Ordinance (Cap 528) [HK] s 121, 121(1)(a), (b), (c)

Rajendra Navaratnam (Cheh Keng Soon with him) (Azman Davidson & Co) for the appellant.
Timothy Siaw (Teng Wei Ren with him) (Shearn Delamore & Co) for the respondents.

Jeffrey Tan FCJ (delivering judgment of the court):

[1] In this appeal against the concurrent findings of the trial court and the Court of Appeal, the sole question of law for determination by this court reads as follows:

> Whether there should be strict compliance with the requirement of s 42 of the Copyright Act 1987 to raise the statutory presumption therein.

[2] As for the background facts, it would suffice to relate just the following. The first respondent, who claimed ownership by acquisition of the copyright, and the second respondent, who claimed an exclusive licence to the copyright in Malaysia and three other countries, filed action against the appellant for

alleged infringement of their copyright to six engineering drawings (see pp 158–163 of the appeal record) of a rotational water meter known as the Kent PSM water meter. The respondents alleged that the appellant caused to be manufactured, imported, and or offered for sale a water meter, known as PD97 TRP (infringing water meter), that was substantially modelled on the Kent PSM water meter. The respondents furthermore alleged that the infringing water meter was substantially the same as the Ningbo water meter, which in relation thereto, in Hong Kong Action 5768/2000, the first respondent had obtained judgment against a supplier of Ningbo water meters for infringement of the first respondent's copyright (though we must add that in *Elster Metering Ltd & Anor v Damini Corp Sdn Bhd & Anor* [2011] 8 MLJ 253, it was held by Azahar Mohamed J, as he then was, that the Ningbo water meter was independently developed). The appellant pleaded that the infringing water meter, manufactured by one Lianyungang Lianli Water Meter Co of China, was of original design.

[3] It was the finding of the trial court that the Kent PSM water meter was of original design (see 468AR), while the infringing water meter, it being substantially copied from the Kent PSM water meter, was not (see 476AR and 480AR), that the appellant had not rebutted the prima facie evidence that the respondents had ownership of the said copyright (see 478AR), and that there was infringement of the copyright by the appellant (see 486AR).

[4] At the Court of Appeal, the appellant argued that the statutory declaration ('SD') filed by the respondents pursuant to s 42 of the Copyright Act 1987 ('the Act') 'failed to adhere to the requirements of the section' in that the drawings annexed to the SD 'lacked originality'. By that, the appellant meant (that was so perceived by the Court of Appeal) that the drawings annexed to the SD were not original drawings but 'modified versions' of the original drawings which could not provide the prima facie evidence of copyright, and that without the original drawings, the court could not judge the originality of the drawings (see paras 3, 6, and 15 of the judgment of the Court of Appeal), to which the respondents countered that each and every modification of the original drawings was annotated with a number and tabulated on the drawings, such that, with the log of modifications, the original design could be made out without the need to produce the entire set of original drawings and modifications thereto (see para 11 of the judgment of the Court of Appeal). The Court of Appeal held that 'the determination of whether the nature of the original drawings was apparent from the drawings annexed to the statutory declaration so as to enable the trial court to rule that the respondents had complied with s 42 is clearly a matter within the province of the trial court', that the appellant had not produced any factual evidence to challenge the respondents' claim to copyright, that the only real challenge of the appellant was on the validity of the assignment of the copyright to the first respondent,

and that the defence of the appellant was unmeritorious as the respondents had shown a complete and unbroken chronology of their ownership to the copyright.

[5] Before us, in his oral submission, learned counsel for the appellant rehearsed the argument that the first respondent had not complied with s 42(1)(a)(ii) and (iii) of the Act and contended that the first respondent had not asserted ownership. 'The changes were shown but not on the original drawings' and 'without the original drawings [one] could not see if there was copyright infringement', argued learned counsel for the appellant. In his written submission, the appellant appended the following arguments: (a) that where a statutory provision allows a departure from the rules of evidence, it must be strictly observed (in support, learned counsel cited *Tse Mui Chun v HKSAR* [2003] HKCU 1408, *Solid Gold Publishers Sdn Bhd v Chan Wee Ho & Ors* [1998] MLJU 276; [1998] 5 CLJ 735, *Elster Metering Ltd & Anor v Premier Amalgamated Sdn Bhd* [2010] 2 CLJ 149, *Ultra Dimension Sdn Bhd v American Home Assurance Co (Rewardstreet.com (M) Sdn Bhd, third party)* [2009] 8 MLJ 643; [2009] 9 CLJ 589, *Ultra Dimension Sdn Bhd v Ketua Pengarah Lembaga Penggalakan Pelancongan Malaysia & Ors* [2010] 8 CLJ 245, and *Public Prosecutor v Sim, Odita, Muhammad Sdn Bhd* [2008] 7 MLJ 164; [2008] 3 CLJ 623, where the court articulated on strict compliance of the provision), (ii) that 'true copies of the original artistic works made by Elster Metering Limited or its predecessor ...' as exhibited by the respondent were not copies of the original artistic works, and, (iii) that the subsequent drawings, even if they were substantially the same as the original drawings, lacked originality to enjoy copyright protection.

[6] Learned counsel for the respondents orally responded that the modifications were made on both original and new drawings, that new drawings yet enjoyed copyright protection, that ownership of copyright was asserted by the respondents, that infringement of a part of the drawings was yet copyright infringement, and that s 42 of the Act had not been rebutted. In his written submission, learned counsel for the respondents submitted, inter alia, (a) that the pivotal issue was whether the drawings were eligible for copyright protection; (b) that the said drawings were eligible for copyright protection; (c) that the modifications, which the courts below found as insubstantial, did not erase the original character of the drawing; (d) that the respondents had strictly complied with s 42 of the Act; (e) that bare denials could not rebut the prima facie facts; (f) that the true copy required by the Act is a true copy of the work eligible for copyright protection; and (g) that the drawings were true copies of the work eligible for copyright protection.

[7] This is the appropriate juncture to reproduce s 42 of the Act, which provides:

(1) An affidavit or statutory declaration made before any person having authority to administer oath by or on behalf of any person claiming to be —

(a) the owner of the copyright in any works eligible for copyright under this Act stating that —

(i) at the time specified therein copyright subsisted in such work;

(ii) he or the person named therein is the owner of the copyright; and

(iii) a copy of the work annexed thereto is the true copy thereof; or

(b) the performer in a performance eligible for performers' right under this Act stating that —

(i) at the time specified therein performers' right subsisted in such performance;

(ii) he or the person named therein is the performer; and

(iii) a copy of the document annexed thereto is the document which proves that he or the person named therein performed in the performance,

shall be admissible in evidence in any proceedings under this Act and shall be prima facie evidence of the facts contained therein.

(c) Any person who is authorised to act on behalf of the owner of the copyright or performer for the purposes of subsection (1) shall be required to produce such authorization in writing.

[8] In relation to any person claiming to be the owner of the copyright in any works eligible for copyright under the Act, s 42(1)(a) provides that the affidavit or SD made by or on behalf of that person shall state that the person is the owner of the copyright and that a copy of the work annexed thereto is a true copy of the copyright. Plainly, s 42(1)(a)(ii) and (iii) provide that the person claiming to be the owner of the copyright must state that he is the owner of the copyright and that the copy of the work annexed to the affidavit or statutory declaration is a true copy of the work in which copyright subsists. Section 42(1)(a)(iii) of the Act requires a true copy of the work. There is no requirement for the original copy of the work (see *Practical Approach to the Enforcement of Intellectual Property Rights* by Jagjit Singh at p 44).

[9] In the following commentary at pp 66 and 68 of *Copyright Law in Malaysia* (3rd Ed), Professor Khaw Lake Tee explained that s 42(1)(a)(iii) requires only a true copy of the work:

> The Copyright Act 1987 provides a means of proving copyright and the ownership thereof in the work in the form of section 42. Under the said section, a person claiming to be the owner of the copyright in a work, or any person on his behalf, may make an affidavit or statutory declaration with a true copy of the work annexed to it, stating that at the time specified, copyright subsists in the work and he is the

> owner of the copyright. Such affidavit or statutory declaration shall be admissible in evidence in any proceedings under the Act and shall be prima facie evidence of the facts stated therein. It should be noted that the facts stated therein are prima facie evidence only and may be rebutted by any person challenging the same.
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> ...
>
> All these preconditions must be complied with before a section 42 affidavit or statutory declaration may be admitted as evidence.
>
> ... a copy of the work must be attached. Mere listing the works in question is not sufficient for this purpose. What must be attached is a true copy; it need not be an exact copy but it must be a copy which is true of all essential particulars. It would appear that to constitute a true copy under section 42, the copy must be a work as defined by the Copyright Act ...
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> *However, where the work is an artistic work in the form of a two-dimensional drawing, a representation or copy of the work would appear to be sufficient.* In *Honda Giken Kogyo Kabushiki Kaisha v Allied Pacific Motor (M) Sdn Bhd* [2005] 3 MLJ 30, where the relevant copyright works were drawings of the design of a motorcycle, the plaintiff attached what the court referred as to the 'representations' drawings, 'representations made by way of photographs' of the motorcycle, and black and white photostated pictures and drawing of the motorcycle. Suriyadi J readily accepted these as evidence without any discussion as to the need for true copies of the drawings. Presumably, such representations constitute works as defined by the Act.

At p 69, Professor Khaw Lake Tee remarked that any requirement for a true copy of a three-dimensional work is 'hardly practicable':

> As the scope of copyright protected works is fairly wide ranging from two-dimensional works such as printed works, artistic works, sheet music to three-dimensional works such as sculptures, buildings, works of artistic craftsmanship and works embodied in various carriers, such as sound recordings and films, the requirement of a true copy is hardly practicable. There are works which may be bulky or difficult to move. In such cases, there is no reason to why a two-dimensional representation, such as a photograph, of a three-dimensional work, could not constitute a true copy. Difficulties would abound if such copy is considered insufficient for the purpose of section 42.

[10] Professor Khaw Lake Tee ended her commentary on s 42 with a reference to *Rock Records & Tapes Co Ltd & 5 Ors v Season Karaoke Sdn Bhd & 4 Ors* [1999] 1 AMR 78, *Rock Records (M) Sdn Bhd v Audio One Entertainment Sdn Bhd* [2005] 3 MLJ 552, *Tse Mui Chun v HKSAR* [2003] HKCU 1408, *HKSAR v Chan Tak Tim* [2004] 4 HKC 98, and *HKSAR v Elegant Technology Ltd* [2004] 3 HKC 37, which cases seemed to the learned professor to suggest that failure to annex a true copy of the work might not necessarily be fatal (see *Copyright Law in Malaysia* at p 69) and that evidence by the copyright owner at the trial might overcome defects in the affidavit (*Copyright Law in Malaysia* at

p 71). In *Rock Records & Tapes Co Ltd & 5 Ors v Season Karaoke Sdn Bhd & 4 Ors*, the plaintiff failed to annex copies of the sound recordings. The court held that s 42 of the Act did not prohibit the use of an affidavit where the work was not annexed nor did it prescribe the one and only method of proving copyright. In *Rock Records (M) Sdn Bhd v Audio One Entertainment Sdn Bhd*, the affidavit merely listed the particulars of the sound recordings alleged to have been infringed. Abdul Malik Ishak J, as he then was, nonetheless accepted the affidavit upon production of the original albums and recordings. In *Tse Mui Chun v HKSAR*, the Hong Kong Court of Final Appeal held that an affidavit filed pursuant to s 121 of the Hong Kong Copyright Ordinance (Cap 528) (which is almost identical to our s 42) 'is not admissible in evidence unless it states the matters required to be stated by paragraphs (a) to (c) of sub-section (1)'. *Tse Mui Chun v HKSAR* espoused strict compliance. Yet, in *HKSAR v Chan Tak Tim*, the Hong Kong Court of Appeal accepted the tender of copies of a video game computer software as true copies of a computer program and rejected the argument that the affidavit on the subsistence and ownership of copyright should not be admitted for failure to comply with s 121(1)(b). And in *HKSAR v Elegant Technology Ltd*, where the affidavit failed to comply with some of the statutory requirements but evidence of ownership was provided at the trial by the copyright owner and ownership of the works was not disputed by the defendant, the Court of Appeal held at p 49, with respect to the argument that the affidavit was defective, that as ownership of the work was not in dispute, the defective affidavit was a technical defect without any relevance to the issue at trial.

[11] Clearly, therefore, there was no requirement for the original drawing, original in the sense of not copied or in the sense of the first or the earliest, to be annexed to the affidavit or SD of the respondents. The requirement was for a true copy of the work, in the sense of a true and accurate depiction of the work in which copyright subsisted. In the context and within the meaning of s 42, the original is the work in which copyright subsisted, while a true copy thereof is a true and accurate representation of that original. The respondents produced what were said to be true copies of the artistic works, namely the drawings in which copyright subsisted. The original drawings were not produced. But as said, there was no requirement for the production of original drawings. On that, we expressly disagree with the Court of Appeal who held 's 42 in its present form allows a copyright owner to produce the original and where such drawings are not available, other drawings to prove copyright ownership' (see para 16 of the judgment of the Court of Appeal) and so obliquely suggested that the original is the document to be annexed. Rather, the production of true copies thereof had fulfilled the requirement of s 42(1)(a)(iii) of the Act.

[12] Still, that which were produced were not true copies of the first or

earliest drawings. That which were produced were true copies of the final drawing, or the final product after successive modifications of the first or the earliest drawings. But in so far as copyright is concerned, ss 7 and 10 of the Act make no distinction between first and subsequent drawings. Section 7 provides that artistic works 'shall be eligible for copyright'. Section 10 of the Act provides that 'copyright shall subsist in every work eligible for copyright of which the author or in the case of a work of joint authorship, any of the authors is, at the time when the work is made, a qualified person'. Section 26(1) of the Act further provides that 'copyright conferred by s 10 shall vest initially in the author'. And s 26(4) provides that 'subject to subsection (3) the name on a work purporting to be the name of its author shall be considered as such, unless the contrary is proved'.

[13] When read together, ss 7, 10 and 26(1) provide that ownership of the copyright of a work eligible for copyright shall subsists initially with the author. 'Unlike patents, trademarks and designs, copyright protection is accorded without any requirement of registration, deposit or otherwise' (*Copyright Law in Malaysia* at p 21). 'Under the Act, copyright arises automatically upon the creation of a work without the need for any form of registration' (*Intellectual Property Law in Malaysia* by Tay Pek San at p 270). In short, copyright subsists without formalities.

[14] It is settled that technical drawings are artistic works eligible for copyright (see *Lau Foo Sun v Government of Malaysia* [1974] 1 MLJ 28; *TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd* [1985] 2 MLJ 45; and, *Peko Wallsend Operations Ltd & Ors v Linatex Process Rubber Bhd and another action* [1993] 1 MLJ 225). Hence, the instant drawings, albeit with modifications of the first or earliest drawings, were nonetheless artistic works. Now whether they were eligible for copyright is a matter of fact and degree. Indeed, each and every revision of the first or earliest drawings could be the subject of copyright. That was so expounded by the learned authors of *The Modern Law of Copyrights and Designs* (3rd Ed), by Laddie Prescott and Vitoria in their commentary on the law relating to works derived from earlier material, at paras 3.64 and 3.65:

> 3.64 In general, a work which is a slavish copy of an earlier work written will not enjoy copyright. Although it is true that no-one is forced to copy such a derivative work, it would nevertheless inconvenient to award it copyright protection. The same is not true of a work which is independently re-created.
>
> 3.65 But even though a work contains a substantial part derived from earlier material, the work can still be the subject of copyright provided sufficient further independent skill, useful labour, knowledge, taste of judgement have been bestowed on it. As said by the Privy Council in *Macmillan & Co Ltd v K & J Cooper*:
>
> > To secure copyright for this product it is necessary that the labour, skill and capital expended should be sufficient to impart to the product some quality or

character which the raw material did not possess, differentiating the product from the raw material.

Thus, (such as collections of statistical data), translations, abridgements and anthologies may be the subject of copyright. Again, copyright may subsists in new editions of existing works, in addition to and independently of the copyright of the first edition (if any) provided that enough fresh work has been done.

[15] Paras 2.15–2.17 of *The Law of Copyright in Singapore* (2nd Ed), by George Wei imparted the following in relation to the copyright of derivative works:

It has already been noted that with derivative works, the skill, labour and judgment of the author must be accompanied by a material change in the expression. In the Privy Council case of *Interlego AG v Tyco Industries Inc*, Lord Oliver observed that there may be original works which makes use of material obtained from pre-existing sources. In this connection Lord Oliver approved of the approach taken by Lord Atkinson in the Privy Council case of *Macmillan & Co Ltd v Cooper* that in the case of derivative works,

> ... it is the product of the labour, skill, and capital of one man which must not be appropriated by another, and the elements, the raw material ... upon which the labour and skill and capital of the first have been expended. To secure copyright for this product it is necessary that labour, skill and capital should be expended sufficiently to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material.

Lord Atkinson then concluded that:

> I think it is clear that it will not create copyright in a new edition of a work, of which the copyright has expired to make a few emendations of the text, or to add a few unimportant notes. To create a copyright by alterations of the text, these must be extensive and substantial, practically making a new book.

Lord Oliver was of the view that important though skill, labour and judgment is in determining originality, it is not a universal test. He said:

> Take the simplest case of artistic copyright, a painting or a photograph. It takes great skill, judgment and labour to produce a good copy by painting or to produce an enlarged photograph from a positive print, but no one would reasonably contend that the copy painting or enlargement was an 'original' artistic work in which the copier is entitled to claim copyright. Skill, labour or judgment merely in the process of copying cannot confer originality. In this connection some reliance was placed on a passage from the judgment of Whitford J in *LB (Plastics) Ltd v Swish Products Ltd*, where he expressed the opinion that a drawing of a three-dimensional prototype, not itself produced from the drawing and not being a work of artistic, craftsmanship, would qualify as an original work. That may well be right, for there is no more reason for denying originality to the depiction of a three-dimensional prototype than there is for denying originality to the depiction in two-dimensional form of any other

> physical object. It by no means follows, however, that that which is an exact and literal reproduction in two-dimensional form of an existing two-dimensional works becomes an original works simply because the process of copying it involves the application of skill and labour. There must in addition be some element of material alteration or embellishment which suffices to make the totality of the work an original work. Of course, even a relatively small alteration or addition quantitatively may, if material suffice to convert that which is substantially copied from an earlier work into an original work. Whether it does so or not is question of degree having regard to the quality rather than the quantity of the addition.

In the case of artistic works, Lord Oliver accepted that the essence of such works is that which is 'Visually significant'. That being so, Lord Oliver came to the conclusion that it would not be enough to confer originality by merely adding in fresh manufacturing instructions to technical design drawings when those drawings were copies of earlier drawings. Lord Oliver accepted that written instructions were helpful as an aid to interpreting technical drawings. In this way the written material, such as the explanatory figures and legend, could help to determine whether the copyright in a drawing has been infringed. That was, however, as far as Lord Oliver was prepared to go on the relevance of written instructions. The written instructions could of course acquire its own copyright as a type of original literary work. The written instructions, even if new, could not confer on an artistic work and originality which it did not possess in its own right.

Interlego AG v Tyco Industries Inc confirms that in the case of derivative works, skill in the copying process is insufficient. The skill, labour and judgment must have resulted in a material change to the expression. Whether there is such a change is a question of fact and degree. This means that if an artist paints an identical copy of the *Mona Lisa*, he will not have a copyright in his painting, even though great skill is shown in making a clone of the original. Paradoxically, a less skilled artist who in producing his copy of the *Mona Lisa*, turns the enigmatic smile into a frown, would probably be able to claim that he has a copyright in his painting as an original artistic work. The changing of the smile into a frown would surely constitute a material change in the expression of the painting.

The issue of originality and derivative drawings was also considered by the High Court of New Zealand in *Husqvarna Forest & Garden Ltd v Bridon New Zealand Ltd*. This case concerned drawings for a chainsaw. The first drawing was for the 'cutter' of the chainsaw and the second was for a 'link' which had a recessed oil reservoir which lubricates the chainsaw. The first drawing was derived from a number of earlier drawings. The second drawing was created with the aid of computer-assisted drafting (CAD). The defence argued that the first drawing lacked originality on the basis that there was 'insufficient change' and in the case of the second drawing because there was insufficient skill and labour to justify copyright. In rejecting these arguments, Smellie J distinguished the *Interlego* case as being a case where the absence of visual change was the critical factor. In the present case, whilst the changes were not large, they were held to have the necessary quality characteristics to make a difference. Smellie J was of the view that 'earlier experimental drawings do not rob the final version relied upon of originality'. On this, Smellie J referred to the English case of *C & H Engineering v F Klucznik* (on

engineering drawings) where Aldous J after stating that he accepted that the threshold for originality was very low continued:

> ... where the drawing is derived from another drawing, it is the visual image of the derived drawing, interpreted by the person to whom the drawing is addressed, which has to be compared with the antecedent work and a decision taken whether the difference between the two is sufficient to make the derived drawing an original work ... Whether the difference is sufficient will depend on the quality of the alteration, taking into account not only the visual difference, but also the thought behind the alteration. It is the combination of the skills of the author which is important ...

In the case of the second drawing, the argument that there was no originality on account of the use of the CAD program was also rejected. Skill was still necessary: the decision of placing the depicted Lubrilink as close as possible to the moving parts, the fact that computer-literacy is not acquired overnight and the fact that a new program has to be worked at before it can be applied.

[16] Copyright is therefore not limited to the first or the earliest work. The following cases, amongst others, illustrate the application of that principle.

[17] In *LA Gear Inc v Hi-Tech Sports plc* (1991) Times, 20 December, it was held by the English Court of Appeal that revisions of drawings are protected by copyright. Nourse LJ said:

> If, in the course of producing a finished drawing, the author produces one or more preliminary versions, the finished product does not cease to be his original work simply because he adapts it with minor variations, or even if he simply copies it, from an earlier version. Each drawing having been made by him, *each is his original work* (quotation taken from the report of *Taylor v Rive Droite Music Ltd* [2004] EWHC 1605). (Emphasis added.)

[18] In *ABB Ltd & Ors v New Zealand Insulators Ltd* [2006] 3 NZLR 645, Courtney J agreed with Smellie J in *Husqvarna Forest & Garden Ltd v Bridon New Zealand Ltd* [1997] 3 NZLR 215 that extensive changes made in subsequent drawings could be sufficient to regard the later drawings as original:

> [181] This issue of originality in the context of modifications to engineering drawings was considered in *Husqvarna*. Smellie J held that the extensive changes made in subsequent drawings were sufficient to regard the later drawings as original. He relied on a passage from an earlier edition of *Copinger & Skone James on Copyright*. I do likewise, though referring to the 15th edition at para 3–134:
>
> > Successive revisions to a complete work, as in the case of revisions to an author's manuscript, may of course result in separate copyright works if the revisions are the product of new skill and labour. The important issue is usually the originality of later versions, although copyright continues to subsist in the earlier versions, whatever use is made of the material contained in it. The issue as to the originality of later versions, or whether the claimant has identified the correct

> work to rely on, used frequently to arise in relation to revisions of engineering drawings. One question is whether it is only the revision rather than the whole of the revised drawing, which is entitled to the newly created copyright ... Whether it is so entitled to copyright depends on whether there has been the addition of some element of material alteration or embellishment which suffices to make the totality of the work an original work. *This is a matter of fact and [degree]; even an alteration or addition which is quantitatively small may, if material, suffice to create an original work*. (Emphasis added.)

[19] In *Fossil Inc v Trimset Ltd & Anor* [2003] HKCU 521, Deputy High Court Judge Carson held that the evidence amply demonstrated that copyright subsisted in the sketch and in the subsequent drawings identified in the statement of claim.

[20] And in *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd* (1995) IP & T Digest 18, where it was contended by the defendant that (a) there was no originality in the drawings for C's new range as they were an adaptation of earlier drawings; (b) the onus lay on the C to specifically identify which drawings had been infringed taking into consideration that the first drawings had been subject to repeated modification; and (c) the copyright in CH's drawings did not belong to C, Laddie J held, according to the report of the judgment:

> A plaintiff was not under a duty to specifically identify which drawings had been infringed, where, as in the instant case, the plaintiff had produced different versions of the copyright work, which varied only slightly, since it would be extremely difficult to determine which drawings had been subsequently copied by the defendant. In the instances where identification would be possible, the probability existed that the drawing would not be the first in the sequence of drawings and, therefore, the copy would have derived from an earlier drawing. In the absence of profound changes in a design over a period of time, the copying of a substantial part of a design would constitute indirect copying of the original drawing in the sequence. *It followed that both the earlier drawings and CH's drawings possessed the requisite originality for copyright to exist in them*. (Emphasis added.)

[21] Each revision would be the matter of copyright, 'so long as sufficient authorship skills and effort have gone into its creation' (*Copyright Law in Malaysia* at p 34). On the originality and authorship of the instant drawings, we see it apt that we should first refer to *Lau Foo Sun*, where on the question of 'whether or not the engineering drawings and designs are original works within the meaning of the Copyright Enactment, FMS Laws (Cap 73)' (replaced by the Act), Ali FCJ, with the concurrence of the entire court, said:

> This, I think, is the crux of the whole matter. Even if it is possible to accept the finding of fact that the appellant had copied substantial portions from PWD drawings, does it in law affect the originality of the appellant's works? The learned trial judge thought it does in view of the word 'original' in s 3(i) of the Enactment.

The section provides:

> 3(i) Subject to the provisions of this Enactment, copyright shall subsist throughout the Federated Malay States for the term hereinafter mentioned in every original literary, dramatic, musical and artistic work, if —
>
> (a) in the case of a published work, the work was first published within the Federated Malay States; and
>
> (b) in the case of an unpublished work, the author was at the date of the making of the work a subject of one of the Rulers or resident within the Federated Malay States,
>
> but in no other works except so far as the protection conferred by this Enactment is extended by notification in the *Gazette* in accordance with Section 22.

The word as it stands clearly does not mean originality of idea or thought. It refers to the work either published or unpublished. Originality of idea is not the subject-matter of copyright. So said Earl of Halsbury, the Lord Chancellor in *Walter v Lane* [1900] AC 539. In that case a verbatim report of speeches made by Lord Rosebery was published in the newspaper 'The Times'. The defendant admitted copying the speeches from the said report and incorporating them in his book called 'Appreciations and Addresses: Lord Rosebery'. His argument that there could not be any copyright in the published report because Lord Rosebery and not the reporter was the author of the speeches was rejected. On p 548 the Lord Chancellor said:

> I do not find the word 'original' in the statute, or any word which imports it, as a condition precedent, or makes originality of thought or idea necessary to the right ...

On p 549 he went on to say:

> Each reporter is entitled to report, and each undoubtedly would have a copyright in his own published report; ...

The same view was expressed in *University of London Press,Limited v University Tutorial Press, Limited* [1916] 2 Ch 601 and in the Australian case *Inala Industries Pty Ltd and Others v Associated Enterprises Pty Ltd* [1960] QD R 562. These authorities apply inasmuch as our Copyright Enactment is substantially a reproduction of the English Copyright Act 1911.

Apart from the authorities s 8(iii) of the Enactment is clear in terms that there is a statutory presumption that copyright exists in any work. It is, of course, a rebuttable presumption. For the respondent to rebut it must be shown that the appellant's works are nothing more than direct tracings of other original works or drawings. This the respondent failed to do for various reasons.

[22] Section 7(3)(a) of the Act provides that 'a literary, musical or artistic work shall not be eligible for copyright unless sufficient effort has been expended to make the work original in character'. But originality in this context means the same as before 1987, that is, that while the artistic work must be original, yet originality in the context of copyright does not mean that

the work must be in an original or novel form. To be original, the work must originate from the author (see the celebrated case of *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, where Pearson J said: 'The originality which is required relates to the expression of the thought. But the (Copyright) Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work — that it should originate from the author', which enunciation was followed by a host of cases, including in the local jurisdiction, *Kiwi Brands (M) Sdn Bhd v Multiview Enterprises Sdn Bhd* [1998] 6 MLJ 38 and *Lam Soon (M) Bhd v Forward Supreme Sdn Bhd & Ors* [2001] 6 MLJ 651, amongst many others). 'The copyright laws do not require that a work should be unprecedented, that is, new in comparison with already existing works. This stands in contrast with some other branches of the law of intellectual property. A patent is bad if the invention was not new, or was obvious, having regard to what was already known or used when protection was applied for. The same is true of a registered design. A copyright, however, is good provided a sufficient amount of the work was originated by the author independently, even if some other person had already produced an identical piece by sheer coincidence' (*The Modern Law of Copyrights and Designs* at para 3.64).

[23] In *Copinger and Skone James on Copyright* (16th Ed), which is arguably, one of, if not the most authoritative text in common law jurisdictions on copyright, the learned authors at para 3-136 imparted the following on derivative works and originality, and the attendant copyright:

> A similar point arises where a work goes through successive revisions in the course of its creation and development. Successive revisions to a complete work, as in the case of revisions to an author's manuscript, may of course result in separate copyright works if the revisions are the product of new skill and labour. The important issue is usually the originality of later versions, although copyright will continue to subsist in the earlier versions, whatever use is made of the material contained in it. The issue as to the originality of later versions, or whether the claimant has identified the correct work to rely on, used frequently to arise in relation to revisions of engineering drawings. On question is whether it is only the revision, rather than the whole of the revised drawing, which is entitled to the newly created copyright. In *LB (Plastics) Ltd v Swish Products Ltd*, it was held that where there has been a previous drawing or a model from which a new drawing is prepared, or some sketches have been made which are in part redrawn, the new drawing will be entitled to copyright as a whole where there has been sufficient relevant skill and labour in producing it. Whether it is so entitled to copyright will usually depend on whether there has been the addition of some element of material alteration or embellishment which suffices to make the totality of the work an original work. This is a matter of fact and degree; even an alteration or addition which is quantitatively small may, if material, suffice to create an original work. However, there is no single test for deciding whether or not a drawing is original by reference to how much skill or labour has been expended on its creation; a distinction must be made between what is visually significant, where skill and labour expended are

> highly important, and work which is not visually significant, where skill and labour involved is not relevant. Even if such a revised or updated drawing is entitled to copyright, there may be problems in establishing infringement of such a work in that the courts, in considering whether a substantial part has been taken, will disregard the parts which have been taken without alteration from the pre-existing works in which the claimant does not own copyright.

[24] The same said para 3-136 presciently continued, as if to address the instant facts and arguments, as follows:

> Generally, however, a defendant can expect to receive short shrift from the court where he attempts to take points about successive versions of work, for example arguing that the earliest works have not been disclosed by the claimant and that the later ones must be unoriginal being copies of the earlier drawings with only insignificant alterations. *The reality, as has been pointed out, is that either the later drawings will as a whole be original or, if not, they are evidence of what earlier, and original drawings looked like. Occasionally, however, the point becomes important, for example because the earlier works are no longer entitled to copyright or because the claimant does not own the copyright in the whole chain of works*. (Emphasis added.)

[25] But the whole chain of works was clearly stated as being owned by the first respondent. In para 4 of the SD, it was affirmed that the said drawings were true copies of original drawings made by employees of the first respondent or its predecessor in the course of their employment. In para 6 of the SD, it was affirmed that on 3 April 1966, Kent Meters Ltd acquired the mechanical meters business and all intellectual property of George Kent Ltd. In para 7 of the SD, the respondents labouriously explained that George Kent Limited changed its name to Brown Boveri Kent Limited on 1 January 1980 which then became Brown Boveri Ltd Plc on 13 August 1982, that Brown Boveri Ltd Plc changed its name to ABB Kent Plc on 6 June 1988, that ABB Kent Plc changed its name and re-registered as ABB Metering Holdings Ltd on 11 January 1999, and that ABB Metering Holdings Ltd changed its name to Elster Metering Ltd on 5 December 2002. The first respondent was at one time known as George Kent Ltd, the original copyright owner. In relation to the instant drawings, in para 8 of the SD, it was affirmed that the first respondent acquired the said copyright by an assignment dated 1 June 2000 between ABB Metering Holdings Ltd and ABB Metering Ltd. And in para 9 of the SD, it was affirmed that the second respondent had the exclusive licence to the same, pursuant to a manufacturing and distribution agreement dated 1 August 1995 between the respondents.

[26] Clearly therefore, it could not be argued that the respondents had not asserted ownership of copyright. Indeed, the respondents had given a complete account, all authenticated by documents, of the chain of ownership of the copyright from the beginning to the lap of the first respondent. More than that, the respondents had shown (see 157AR) that all modifications of the original

design were brought about by the labour and effort (the dates of execution of the works were disclosed) of the employees (all named) of the first respondent or its predecessors from whom the first respondent acquired the copyright. The original design and its modifications, as per the drawings, all originated from the first respondent or its predecessors in title. The first respondent was the owner of the copyright of the original design and entire chain of modifications. As such, as imparted by *Copinger and Skone James on Copyright* (16th Ed), at para 3-136, the appellant should be given 'short shrift from the court' in their attempt to argue that the earliest works had not been disclosed and that the later ones must be unoriginal being copies of the earlier drawings with only insignificant alterations. Again as imparted by *Copinger and Skone James on Copyright* (16th Ed), at para 3-136, the latter argument might be important where 'the earlier works are no longer entitled to copyright or because the claimant does not own the copyright in the whole chain of works'. But as the first respondent owned 'the entire chain of works', the original drawings and all modifications should be taken as a whole and as being original.

[27] It was so convincingly made out that copyright subsisted in the said drawings and that the first and second respondents were respectively owner and licensee of the copyright. On top of that, s 26(4)(a) of the Act provides that 'subject to subsection (3) (which is not applicable to the instant case), the name on a work purporting to be the name of its author shall be considered as such, unless the contrary is proved'. Pertinently, on each of the said drawings (see 228A–228E of the appeal record), the predecessor in title of the first respondent, namely Kent Meters Ltd, appeared as the author. It was not shown to us that Kent Meters Ltd was not the author or that the s 42 prima facie evidence had been rebutted. It was also not shown to us that the finding of the courts below on infringement of copyright could not be supported. With respect, we see no arguable merit in this appeal.

[28] Nevertheless, we could answer the leave question as follows. Under s 42(1) of the Act, an affidavit or SD made by or on behalf of a person claiming the copyright to any works eligible for copyright must strictly comply with the whole of s 42(1)(a)(i–iii) of the Act. An affidavit or SD that does not, will not be admissible as prima facie evidence. But s 42 of the Act is far from being the be-all and end all of proof. For other than by affidavit or SD, a person claiming copyright could adduce oral evidence and tender other evidence, the admission of which is not precluded by the Act. Section 42 provides a means but not the only means of proving copyright. And given that oral evidence, which is open to cross-examination and therefore of higher evidential value than affidavit or SD evidence, we agree with the pragmatic approach adopted by some courts to allow oral evidence to augment, correct, and or even supplant a defective s 42 affidavit or SD.

[29] For the reasons aforesaid, we unanimously dismiss this appeal with costs.

Appeal dismissed with costs.

Reported by Ashok Kumar